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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Cristobal Hernandez, Jr.,

10 Plaintiff,

11 v.

12 Janice K Brewer, et al.,

13 Defendants.  
14

No. CV-11-01945-PHX-JAT

**ORDER**

15 Pending before the Court are Plaintiff's Motion for Recusal (Doc. 199), Plaintiff's  
16 Motion for Miscellaneous Relief under Rule 60 of the Federal Rules of Civil Procedure  
17 ("Rule 60") (Doc. 180), and several additional motions and miscellaneous filings by  
18 Plaintiff asking the Court to take "Judicial Notice" of purportedly "new" information or  
19 otherwise reconsider past holdings. (Doc. 176, 177, 183, 186, 188, 189, 192, 193, 195,  
20 203, 204, 205, 209, 210, 211, 213, 217, 219, 220, 221). Also pending before the Court is  
21 the Pinal County Defendants'<sup>1</sup> Motion to Declare Plaintiff a Vexatious Litigant (Doc.  
22 197), which the State Defendants<sup>2</sup> subsequently joined (Doc. 198). The Court now rules  
23 on the motions.  
24

25 <sup>1</sup> The "Pinal County Defendants" include the County of Pinal, James P. Walsh,  
26 Pinal County Board of Supervisors, Janet Gygax, Paul R. Babeu, James Rimmer, and  
Benjamin Parry.

27 <sup>2</sup> The "State Defendants" include the State of Arizona, Janice Brewer, Matthew  
28 Conti, Barton Fears, Terry Goddard, Monica Goddard, Eric Herrmann, Thomas Horne,  
Stephen Lepley, and Katrin Nelson (together with the Pinal County Defendants,  
"Defendants").

1     **I.     BACKGROUND**

2           These motions relate to a §1983 claim Cristobal Hernandez, Jr. (“Plaintiff”)  
3 brought against Defendants in October 2011. (Doc. 1). On July 9, 2012, this Court  
4 dismissed all of Plaintiff’s claims except one, which was a Fourth Amendment claim  
5 against Defendant Parry, a Pinal County deputy who conducted a traffic stop of Plaintiff.  
6 (Doc. 42). Subsequently, on September 10, 2013, this Court granted summary judgment  
7 to Defendant Parry and issued a final judgment for Defendants. (Doc. 167).

8           Plaintiff then appealed to the Ninth Circuit Court of Appeals. On August 26, 2016,  
9 the Ninth Circuit affirmed this Court’s ruling and ultimately denied Plaintiff’s many  
10 motions and requests, including a request for reconsideration, a panel rehearing, and a  
11 rehearing en banc. *Hernandez v. Brewer*, 658 Fed. Appx. 837, 839 (9th Cir. 2016), *cert.*  
12 *denied sub nom. Hernandez v. Ducey*, 137 S. Ct. 1333 (2017), *reh’g denied*, 137 S. Ct.  
13 2151 (2017). Plaintiff then filed a petition for a writ of certiorari to the United States  
14 Supreme Court, which was denied on March 30, 2017. *Id.* Plaintiff’s subsequent petition  
15 for rehearing was also denied. *Id.*

16           Although this Court entered a judgment in Plaintiff’s case, which was affirmed by  
17 the Ninth Circuit and refused to be reheard by the Supreme Court, Plaintiff reverted to  
18 filing motions and requests in this Court. Plaintiff submitted numerous motions calling  
19 the Court’s attention to “new” evidence or case law (Doc. 176, 177, 183, 186, 188, 189,  
20 192, 193, 195, 203, 204, 205, 209, 210, 211, 213, 217, 219, 220, 221), in addition to a  
21 more formal request for relief under Rule 60 (Doc. 180) and a Motion for Recusal (Doc.  
22 199).<sup>3</sup> Defendants filed timely responses to each of Plaintiff’s motions calling for action.  
23 (Doc. 184, 187, 190, 194, 200, 206, 214, 218). Additionally, Defendants asked the Court  
24 to declare Plaintiff a vexatious litigant and enter a pre-filing order against him. (Doc. 197,

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26           <sup>3</sup> Other than the Motion for Recusal (Doc. 199), the Court will liberally construe  
27 all of Plaintiff’s other filings as requests for relief under Rule 60 (“Rule 60 Motions”).  
28 For instance, Plaintiff’s Motion to Amend (Doc. 189) may be couched as a motion to  
amend, but, as the time to amend has long since passed, it is really a motion for relief  
under Rule 60. The Court will consider all of Plaintiff’s pending Rule 60 Motions  
together. *See infra* part III.

198). The Court will first analyze Plaintiff's pending Motion for Recusal (Doc. 199).

## 2 **II. MOTION FOR RECUSAL**

3 Plaintiff moves for the undersigned judge's recusal "for not follow[ing] binding  
4 case law." (Doc. 199).

### 5 **A. Legal Standard**

6 Two statutes govern whether a federal judge must recuse in a particular case. The  
7 first, 28 U.S.C. § 144, provides:

8 Whenever a party to any proceeding in a district court makes  
9 and files a timely and sufficient affidavit that the judge before  
10 whom the matter is pending has a personal bias or prejudice  
11 either against him or in favor of any adverse party, such judge  
12 shall proceed no further therein, but another judge shall be  
13 assigned to hear such proceeding. The affidavit shall state the  
14 facts and the reasons for the belief that bias or prejudice  
exists, . . . A party may file only one such affidavit in any  
case. It shall be accompanied by a certificate of counsel of  
record stating that it is made in good faith.

15 28 U.S.C. § 144 (2006).

16 The second statute, 28 U.S.C. §455, further provides in pertinent part:

17 (a) Any justice, judge, or magistrate of the United States shall  
18 disqualify himself in any proceeding in which his impartiality  
might reasonably be questioned.

19 (b) He shall also disqualify himself in the following  
20 circumstances:

21 (1) Where he has a personal bias or prejudice concerning a  
22 party, or personal knowledge of disputed evidentiary facts  
concerning the proceeding.

23 28 U.S.C. § 455 (2006).

24 The substantive standard for recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455 is  
25 "whether a reasonable person with knowledge of all the facts would conclude that the  
26 judge's impartiality might reasonably be questioned." *United States v. Bigley*, CV-14-  
27 00729-PHX-HRH, 2017 WL 3432370, at \*2 (D. Ariz. Aug. 10, 2017) (citations omitted).  
28 In interpreting these statutes, the United States Supreme Court determined that "judicial

1 rulings alone almost never constitute a valid basis for a bias or partiality motion.” *Liteky*  
2 *v. United States*, 510 U.S. 540, 541 (1994). This is because a judge’s opinions formed  
3 “on the basis of facts introduced or events occurring in the course of the current  
4 proceedings, or of prior proceedings do not constitute a basis for a bias or partiality  
5 motion unless they display a deep-seated favoritism or antagonism that would make fair  
6 judgment impossible.” *Id.* at 555. “A judge’s ordinary efforts at courtroom  
7 administration—even a stern and short-tempered judge’s ordinary efforts at courtroom  
8 administration—remain immune.” *Id.* at 556. Thus, statements made during the course of  
9 a trial or in ruling on particular motions can establish bias only in extreme circumstances  
10 because a judge’s impartiality ordinarily “must stem from an extrajudicial source.” *Id.* at  
11 544 (citation omitted).

12 The moving party bears the burden of proving facts sufficient to justify recusal.  
13 *Denardo v. Municipality of Anchorage*, 974 F.2d 1200, 1201 (9th Cir. 1992) (citation  
14 omitted). The mere filing of an affidavit of disqualification pursuant to 28 U.S.C. § 144  
15 does not amount to sufficient proof. *See Bigley*, 2017 WL 3432370, at \*2. Pursuant to the  
16 terms of the statute, the Court must first determine whether the claims of bias are legally  
17 sufficient before determining that the Court “shall proceed no further” on the movant’s  
18 case. *Liteky*, 510 U.S. at 544. The statute “must be given the utmost strict construction to  
19 safeguard the judiciary from frivolous attacks upon its dignity and integrity, and to  
20 prevent abuse and to insure orderly functioning of the judicial system.” *Rademacher v.*  
21 *City of Phoenix*, 442 F. Supp. 27, 29 (D. Ariz. 1977) (citations omitted). Allegations that  
22 are merely conclusory are not legally sufficient. *See United States v. \$292,888.04 in U.S.*  
23 *Currency*, 54 F.3d 564, 566 (9th Cir. 1995).

## 24 **B. Analysis**

### 25 **1. Plaintiff’s Motion is Untimely**

26 Plaintiff’s motion is untimely as this Court granted a final judgment in favor of  
27 Defendants on September 10, 2013. (*See* Doc. 167). The Ninth Circuit has not defined an  
28 exact time within which a party must file a recusal motion after ascertaining grounds for

1 such a motion, but “it is generally held that parties that suspect possible bias or prejudice  
2 toward them must not withhold filing recusal motions until their dispute has been  
3 resolved on the merits.” *Bigley*, 2017 WL 3432370, at \*3 (citing *E. & J. Gallo Winery v.*  
4 *Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (“To hold otherwise would  
5 encourage parties to withhold recusal motions, pending a resolution of their dispute on  
6 the merits, and then if necessary invoke section 455 in order to get a second bite at the  
7 apple.”)).

8 Here, Plaintiff stated that he repeatedly suspected bias or prejudice against him  
9 throughout the proceedings, but this motion comes over four years after a judgment was  
10 already entered against him in this Court and over a year after that judgment was  
11 affirmed by the Ninth Circuit on August 26, 2016. *See supra* part I. This motion also  
12 follows a previous motion for recusal of the undersigned couched as a Motion for Change  
13 of Venue (Doc. 83), which the Honorable G. Murray Snow denied in reasoning that  
14 “[n]one of [Plaintiff’s] arguments have merit.” Finally, Plaintiff provided no facts  
15 demonstrating good cause for the late filing of his instant motion. *See United States v.*  
16 *Studley*, 783 F.2d 934, 939 (1986) (“a motion for recusal filed weeks after the conclusion  
17 of a trial is presumptively untimely absent a showing of good cause for its tardiness”)  
18 (citations omitted).

## 19 **2. Plaintiff’s Motion lacks Merit**

20 Even ignoring the untimeliness of Plaintiff’s motion, Plaintiff’s motion fails to  
21 raise any proper grounds for recusal. Rather, Plaintiff alleges that the undersigned has  
22 “not followed binding case law” and “ignored” evidence without referencing any  
23 extrajudicial source. (*See* Doc. 199 at 1-2). Plaintiff’s allegations that the Court ignored  
24 case law and evidence are grounds for appeal, not for recusal. *See Liteky*, 510 U.S. at 555.  
25 Plaintiff did appeal and this Court’s ruling was affirmed by the Ninth Circuit. *See supra*  
26 part I. Plaintiff has since exhausted his legal remedies in this closed case.

27 Plaintiff alleges no extrajudicial sources by which the undersigned may have  
28 developed a bias against him, nor does Plaintiff identify any conduct on his part, apart

1 from the undersigned's rulings in the case, by which to infer bias. Without an  
2 extrajudicial source, the only circumstance in which recusal would be appropriate is  
3 when actions by the judge reveal a lack of impartiality so high that fair judgment would  
4 be impossible. *See Liteky*, 510 U.S. at 555. Plaintiff does not demonstrate that the Court  
5 demonstrated that high level of favoritism or antagonism herein and fails to carry his  
6 burden of proving facts sufficient to justify recusal. *See Denardo*, 974 F.2d at 1201.  
7 Accordingly, Plaintiff's Motion for Recusal (Doc. 199) is hereby denied.

### 8 **III. RULE 60 MOTIONS**

9 Next, the Court will address Plaintiff's pending Rule 60 Motions. Plaintiff only  
10 specifically implicates Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6), but the  
11 Court will consider Plaintiff's motions and related claims under the totality of Rule 60.  
12 (*See* Doc. 180).

#### 13 **A. Legal Standard**

14 "A final judgment may be reopened only in narrow circumstances." *Henderson v.*  
15 *Shinseki*, 562 U.S. 428, 440 (2011). Rule 60(b) "provides for reconsideration only upon a  
16 showing of[:] (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence;  
17 (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6)  
18 'extraordinary circumstances' which would justify relief." *Fuller v. M.G. Jewelry*, 950  
19 F.2d 1437, 1442 (9th Cir. 1991) (citing Fed. R. Civ. P. 60(b)). There is a one year statute  
20 of limitations from the entry of judgment in place for motions brought under Rule  
21 60(b)(1), (2), or (3). *See, e.g., Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir.  
22 1989). Rule 60(b)(6) does not have the same, strict one year limitation and "must be filed  
23 within a reasonable time[.]" *Musser v. United States*, 62 F.3d 1425 (9th Cir. 1995).  
24 However, "[t]he long-standing rule in this circuit is that, clause (6) and the preceding  
25 clauses are mutually exclusive; a motion brought under clause (6) must be for some  
26 reason other than the five reasons preceding it under the rule" or it may be properly  
27 barred for falling outside of the one year period. *Lyon v. Agusta S.P.A.*, 252 F.3d 1078,  
28 1088-89 (9th Cir. 2001), *as amended* (July 9, 2001) (internal quotation marks and citation

1 omitted).

2 A change in the law may, in certain situations, justify relief under Rule 60(b)(6).  
3 *Phelps v. Alameida*, 569 F.3d 1120, 1134 (9th Cir. 2009). In such a case, a court must  
4 conduct a “case-by-case inquiry,” which requires the balancing of multiple factors,  
5 including “the competing policies of the finality of judgments and the incessant command  
6 of the court’s conscience that justice be done in light of all the facts.” *Id.* at 1133 (citation  
7 omitted). Ultimately, the movant must show “extraordinary circumstances justifying the  
8 reopening of a final judgment.” *Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017) (citation  
9 omitted).

## 10 **B. Analysis**

11 Preliminarily, the Court notes that to the extent Plaintiff’s Rule 60 Motions rest on  
12 60(b)(1), (2) or (3), they are barred by the one year statute of limitations because this case  
13 was closed on September 10, 2013. *See supra* part I. Plaintiff fails to make any allegation  
14 exclusively based on Rule 60(b)(6), so the Court could deny the motions on this basis.  
15 Nonetheless, the Court will liberally construe Plaintiff’s Rule 60 Motions to determine  
16 whether Plaintiff carried his burden of demonstrating that “extraordinary circumstances”  
17 exist to justify reopening this case under any of the grounds for relief provided by Rule  
18 60. *See Hall*, 861 F.3d at 987.

### 19 **1. Rule 60(b)(1)**

20 Rule 60(b)(1) provides for relief from a final judgment in the case of an  
21 inadvertent mistake or omission by the Court or a party. Fed. R. Civ. P. 60(b)(1). Plaintiff  
22 failed to make any credible argument of mistake, inadvertence, surprise, or excusable  
23 neglect. *See* Fed. R. Civ. Pro. 60(b)(1). Plaintiff did, however, allege various factual and  
24 legal errors.

25 “The Ninth Circuit has specifically recognized that errors of  
26 law are cognizable under Rule 60(b). *See Liberty Mut. Ins.*  
27 *Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir.1982). It has also  
28 noted that, where the legal error is a mistake by the court,  
Rule 60(b)(1) is applicable. *See id.*; *see also In re Int’l*  
*Fibercom, Inc.*, 503 F.3d 933, 941 n.7 (9th Cir. 2007).”

1 *Prado v. Quality Loan Serv. Corp.*, No., 2014 WL 2119864, at \*2 (N.D. Cal. May 21,  
2 2014).

3 When considering “mistake,” the Court must consider four factors. *Bateman v.*  
4 *U.S. Postal Servs.*, 231 F.3d 1220, 1223 (9th Cir. 2000). Specifically, “(1) the danger of  
5 prejudice to the opposing party; (2) the length of delay and its potential impact on the  
6 proceedings; (3) the reason for the delay; and (4) whether the movant acted in good  
7 faith.” *Id.* at 1223-24 (9th Cir. 2000). Since Plaintiff did not make a cognizable argument  
8 regarding any of these factors, it is very difficult for the Court to apply them. However, to  
9 the extent obtaining relief under Rule 60(b)(1) is the movant’s burden, Plaintiff has failed  
10 to show that any of these factors weigh in his favor. After review of the record, the Court  
11 finds that there is no evidence of such a mistake. Accordingly, relief under Rule 60(b)(1)  
12 is denied.

## 13 **2. Rule 60(b)(2)**

14 Rule 60(b)(2) allows for relief from a final judgment based on “newly discovered  
15 evidence that, with reasonable diligence, could not have been discovered in time to move  
16 for a new trial under Rule 59(b),” which is 28 days after the entry of judgment. Fed. R.  
17 Civ. P. 59(b), 60(b)(2). Under this clause, “the movant must show the evidence (1)  
18 existed at the time of the trial, (2) could not have been discovered through due diligence,  
19 and (3) was ‘of such magnitude that production of it earlier would have been likely to  
20 change the disposition of the case.’” *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th  
21 Cir. 1990) (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208,  
22 211 (9th Cir. 1987)).

23 Based on a review of the record, including Plaintiff’s suggestions that he  
24 discovered “new” evidence relevant to this case, the Court concludes that Plaintiff failed  
25 to demonstrate such evidence exists. Even if such evidence did exist, Plaintiff fails to  
26 assert that the purportedly “new” evidence could not have been discovered at the time of  
27 trial, so as to justify relief from the judgment. Accordingly, relief under Rule 60(b)(2) is  
28 denied.

1                   **3.     Rule 60(b)(3)**

2           Rule 60(b)(3) provides relief in the event of fraud. Fed. R. Civ. P. 60(b)(3). Rule  
3   60(b)(3) “is aimed at judgments which were unfairly obtained, not at those which are  
4   factually incorrect.” *In re M/V Peacock on Complaint of Edwards*, 809 F.2d 1403, 1405  
5   (9th Cir. 1987). Here, Plaintiff repeatedly states that Defendants engaged in a “conspiracy  
6   to commit fraud upon the court.” (*See, e.g.*, Doc. 189 at 1). The Court, however, will not  
7   consider fraud, misrepresentation, or misconduct by Defendants because there is no  
8   evidence or argument showing the presence of these issues. Conversely, Plaintiff  
9   contends that the judgment against him was due to “fundamental unfairness” because this  
10   Court applied an incorrect legal standard in his case. (*See* Doc. 180 at 14). Accordingly,  
11   relief under Rule 60(b)(3) is denied.

12                   **4.     Rule 60(b)(4)**

13           Rule 60(b)(4) allows for relief if the judgment is void. Fed. R. Civ. P. 60(b)(4).  
14   “Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a  
15   certain type of jurisdictional error or on a violation of due process that deprives a party of  
16   notice or the opportunity to be heard.” *Am. Realty Capital Properties Inc. v. Holland*,  
17   CV-14-00673-PHX-DGC, 2014 WL 5023004, at \*2 (D. Ariz. Oct. 8, 2014) (quoting  
18   *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010)). This  
19   circumstance does not exist in the instant case. Accordingly, relief under Rule 60(b)(4) is  
20   denied.

21                   **5.     Rules 60(b)(5) and 60(b)(6)**

22           Rule 60(b)(5) provides relief from a final judgment if “the judgment has been  
23   satisfied, released, or discharged; it is based on an earlier judgment that has been reversed  
24   or vacated; or applying it prospectively is no longer equitable.” Fed. R. Civ. P. 60(b)(5).  
25   A movant under Rule 60(b)(5) “must establish that a significant change in facts or law  
26   warrants revision of the decree and that the proposed modification is suitably tailored to  
27   the changed circumstance.” *Shoen v. Symons*, CV06-3008-PHX-DGC, 2011 WL  
28   3555582, at \*1 (D. Ariz. Aug. 11, 2011) (quoting *Rufo v. Inmates of Suffolk County Jail*,

1 502 U.S. 367, 368 (1992)). Additionally, Rule 60(b)(6) is a catch-all provision, where a  
2 judgment may be set aside for “any other reason that justifies relief.” Fed. R. Civ. P.  
3 60(b)(6).

4 Here, to the extent Plaintiff makes a cognizable argument for relief under Rule 60,  
5 it relates to purported changes in case law. Plaintiff requests the court to “revisit[] its  
6 judgment” and directs the Court’s attention to the Supreme Court’s ruling in *Honeycutt v.*  
7 *United States*. 137 S. Ct. 1626 (2017). (Doc. 180 at 1). Plaintiff argues that the Supreme  
8 Court’s decision in *Honeycutt* requires relief from the final judgment against him. (*Id.*). If  
9 viable, Plaintiff’s argument could fall under Rule 60(b)(6). *See Phelps*, 569 F.3d at 1132  
10 (holding in part that a Rule 60(b)(6) motion is the proper means of bringing a challenge  
11 based on a change of law).

12 The Court reviewed the purported change in law in *Honeycutt* as suggested by  
13 Plaintiff. There, the Supreme Court reiterated the principle that “[c]riminal forfeiture  
14 statutes empower the Government to confiscate property derived from or used to  
15 facilitate criminal activity.” *Honeycutt*, 137 S. Ct. at 1631. The Supreme Court further  
16 explained that certain forfeiture mechanisms are “limited to property the defendant  
17 himself actually acquired as the result of the crime.” *Id.* at 1635. This Court finds that  
18 *Honeycutt* does not represent a significant change of the law such that it would abrogate  
19 the final judgment in this case under Rule 60. *See Gonzalez v. Crosby*, 545 U.S. 524, 535  
20 (2005) (requiring a movant to show “extraordinary circumstances” to justify reopening a  
21 final judgment); *see also Flores v. Arizona*, 516 F.3d 1140, 1163 (cautioning against the  
22 use of Rule 60(b) provisions “to circumvent the strong public interest in [the] timeliness  
23 and finality of judgments.”). Nothing in *Honeycutt* is relevant to Plaintiff’s §1983 claim  
24 regarding his alleged October 6, 2009 traffic stop or allegations that Defendants  
25 improperly targeted Plaintiff and initiated forfeiture proceedings against his home in  
26 relation to Plaintiff’s alleged involvement in a drug and money laundering ring. (*See Doc.*  
27 *42 at 3-7* (dismissing the majority of Plaintiff’s claims)). Accordingly, Plaintiff’s Rule 60  
28 motion fails in its totality.

#### IV. VEXATIOUS LITIGANT MOTION

Also pending before the Court is Defendants’ Motion to Declare Plaintiff a Vexatious Litigant (Doc. 197, 198) and enter a pre-filing order against him. While the Court agrees with Defendants that Plaintiff “continues to flood this Court’s docket with frivolous and duplicative motions,” the Court is confident that Plaintiff will understand the finality of this order, and the finality of the Ninth Circuit’s affirmation of this Court’s previous dismissal of his case. (*See* Doc. 197 at 1). As such, the Court trusts that Plaintiff will not need to be designated as a vexatious litigant and will understand that this matter is closed.<sup>4</sup> Accordingly, Defendants’ motion is denied without prejudice.

## V. CONCLUSION


For the reasons set forth above,

**IT IS ORDERED** that Plaintiff's Motion to Recuse (Doc. 199) is **DENIED**.

**IT IS FURTHER ORDERED** that the Plaintiff's Rule 60 Motions (including Doc. 176, 177, 180, 183, 186, 188, 189, 192, 193, 195, 203, 204, 205, 209, 210, 211, 213, 217, 219, 220, 221) are **DENIED**.

**IT IS FURTHER ORDERED** that the Defendants' Motion to Declare Plaintiff a Vexatious Litigant (Doc. 197) is **DENIED** without prejudice to refile if necessary. This remains closed.

Dated this 22nd day of December, 2017.

  
James A. Teilborg  
Senior United States District Judge

<sup>4</sup> Should Plaintiff fail to understand that this case is closed and continue to file frivolous and untimely motions, Defendants may file a renewed motion to declare Plaintiff a vexatious litigant or seek other sanctions, including attorney's fees.